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No. 96-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENT HAS NO STANDING TO BRING THIS ACTION

Concerned that this Court might grant the Petition and examine the Seventh Circuit's decision on the basis that Respondent lacks standing, Respondent attempts to touch as lightly as possible on the Article III issue. Respondent blithely (and unconvincingly) suggests that this case is simply one of statutory construction, raising no constitutional issues, and that, consequently, the Seventh Circuit's decision could not conflict with this Court's interpretation of Article III. Resp. Br. at 11. Of course that is wrong, and Respondent thus makes no attempt to discuss this Court's holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), its effect on the standing of citizen plaintiffs seeking to sue for past EPCRA violations, or any of this Court's standing cases.

Instead, Respondent cites, without discussion, three district court cases for the proposition that late-filed EPCRA reports confer standing on EPCRA citizen plaintiffs. Resp. Br. at 11-12.[1] These district courts erroneously found that a citizen plaintiff had standing to sue for wholly past EPCRA violations on the notion that: 1) persons who are deprived of information because of

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[1] Respondent is also mistaken that Petitioner "fail[ed] to argue standing at the trial court level. . . ." Resp. Br. at 11. The Steel Company has raised the issues of standing and mootness at every step of this case. Steel Company's Memorandum in Support of Motion to Dismiss at 8, *Citizens for a Better Environment v. The Steel Co.*, 42 Env't Rep. Cas. (BNA) 1186 (N.D. Ill. 1995); Steel Company's Appellee Brief at 33, *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (1996). Even if Respondent were correct, standing is a necessary element of federal court jurisdiction and can be attacked for the first time on appeal. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986).

late-filed reports suffer an injury in fact; and 2) the injury is redressable by a court's imposing penalties for the late reports, enjoining future EPCRA violations (even though the defendant had long come into compliance), or awarding costs of litigation.

Respondent cannot show an injury, but even if it could, Respondent certainly cannot demonstrate redressability. None of the factors cited by the three district courts—that a court may enjoin a party from committing future EPCRA violations, assess penalties payable to the U.S. Treasury, or award attorneys' fees and costs—satisfies the redressability prong of the standing test.

That a court may impose penalties payable to the U.S. Treasury or enjoin future violations does not give an EPCRA citizen plaintiff a sufficient stake in a case for Article III purposes. By seeking penalties or relief enjoining future violations, Respondent is not acting on its own behalf, but is instead acting on behalf of the government and the public at large. *Cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) (private parties have no judicially cognizable interest in the prosecution of another); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (same). Because it is undisputed that The Steel Company was in compliance before this suit was filed, Respondent's only interest in this case is that The Steel Company be called upon to answer for any past violations by paying penalties. Such an interest does not go beyond the "undifferentiated public interest" in the "faithful execution" of our country's laws and is insufficient to confer standing on the citizen plaintiff. *See Lujan*, 504 U.S. at 577; *see also Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 70 (Scalia, J., concurring) ("If it is undisputed that the defendant was in a state of compliance when this suit

was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit.") Just as the possibility of penalties or future injunctive relief does not confer standing, this Court has likewise held that a possible award of attorney's fees does not constitute a sufficient interest in a case for Article III purposes. *Lewis Continental Bank v. Lewis*, 494 U.S. 472, 480 (1990); *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986).

That *Lujan* involved a government defendant does not matter for Article III purposes. Under *Lujan*, a citizen does not have standing to proceed against a private defendant "unless he can show some kind of personal stake. After *Lujan*, the citizen-suit provisions are probably unconstitutional even when the defendant is a private citizen or corporation." Cass R. Sunstein, *What's Standing After* Lujan*?, of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 231-32 (1992).

Not only does Petitioner maintain that Respondent has no standing, but the United States agrees with Petitioner that a past violation cannot confer standing on an environmental citizen suit plaintiff:

> A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in any meaningful sense the citizen's alleged injuries. Indeed, if Congress were to

> give private citizens untrammeled authority to seek penalties for wholly past violations—oblivious to Article III's requirement that a litigant have a personal stake in the controversy—it would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.[2]

Because Respondent has no standing to bring this action, a position also supported by the United States, the Court should grant the Petition and reverse the decision below.

II. THERE ARE NO ISSUES TO DISTILL OR REFINE

Respondent also urges denial of the Petition so that the issue can percolate among the lower courts. Resp. Br. at 12-13. Respondent fails to explain, however, what is to be gained by additional percolation of this purely legal issue. There are no issues to distill or refine; there are no complex, analytical approaches to the question presented that might benefit from additional discussion and testing in the lower courts. This case does not present a situation where "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Court] to deal with the issue more wisely

[2] Brief of the United States as Amicus Curiae Supporting Affirmance at n. 34, *Gwaltney*, 484 U.S. 49 (1987) (citation omitted) (available in LEXIS, Genfed Library, USPlus File). The United States urged affirmance arguing that respondents had properly alleged that Gwaltney was in violation of its discharge permit, but rightly noted that there is no standing if the violation is wholly past. In this case, the United States submitted an amicus brief and argued to the Seventh Circuit that EPCRA citizen suits would not interfere with EPA's enforcement discretion, but the United States did not address the threshold issue of whether Respondent has standing to bring this action.

at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983). A fully percolated conflict has been reached: the Sixth and Seventh Circuit Courts of Appeals have taken opposite positions, and the Seventh Circuit's decision below conflicts with this Court's holdings in *Lujan* and *Gwaltney*.[3]

These circumstances merit review by this Court. Continued percolation will lead only to continued litigation. The courts, industry, and citizen groups will benefit from the Court's ruling on this issue resolving the conflict between the circuits.

III. RESPONDENT MISAPPREHENDS THE IMPACT OF THE SEVENTH CIRCUIT'S OPINION AND OVERSTATES EPCRA'S EFFECT

In stating that the Seventh Circuit did not hold that citizen plaintiffs may now target years' old EPCRA violations, Resp. Br. at 13-14, Respondent misinterprets the effect of the decision below and also retreats from its main argument: that a party who fails to file EPCRA reports by March 1 and July 1 each year has violated EPCRA and is therefore subject to citizen enforcement. Opening Brief of Appellant at 17, *Citizens for a Better Environment v. The Steel Co.*, 90 F.3d 1237 (7th Cir.

[3] Respondent states that this Court's discussion of the purpose of the 60-day notice period is "dicta." Resp. Br. at 8. Far from being mere commentary on a side issue, this Court's finding that "the purpose of notice to the alleged violator is to give it an opportunity to come into compliance with the Act and thus likewise render unnecessary a citizen suit," *Gwaltney*, 484 U.S. at 60, was one of its main bases for holding that Congress did not intend to allow citizen suits for past Clean Water Act violations. The Seventh Circuit's opinion also conflicts with *Gwaltney* on several other points. Petition at 9-16, 19-22.

1996) (Because The Steel Company had not submitted reports before the specified dates, "[t]he language of the statute authorizes Citizens for a Better Environment to pursue this action for untimely reports.") Nothing in the Seventh Circuit's opinion bars citizen groups from searching government records to find old EPCRA violations on which to base citizen suits, something Congress certainly could not have intended when it enacted EPCRA. Petition at 26-27. Moreover, interest groups, many of which have aggressively pursued EPCRA cases, now armed with the Seventh Circuit's opinion, may well become emboldened to actively seek out past violations, not to secure compliance (compliance having long been achieved), but only to obtain penalties and attorneys' fees. Congress could not have intended such a use of EPCRA's citizen suit authority.

Finally, Respondent takes issue with The Steel Company's assertion that EPCRA is different from other environmental statutes because it is solely a reporting statute. Respondent states that parties reporting under EPCRA have reduced their releases by 43 percent since 1988 and appears to imply that EPCRA is the driving force behind the reduction. Resp. Br. at 14 n. 5. Respondent does not attempt to explain the nexus between EPCRA's requirements and reduced emissions, however, and fails to note that EPCRA does nothing to restrict a facility's emissions (its permits required under other environmental laws do that) nor does EPCRA provide incentives to reduce emissions. Because businesses must earn a profit to survive, financial reasons are the likely incentive behind the noted reductions. *See* Bradford Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 Ohio St. L.J. 761, 769-70 (1992) (While voluntary reductions in releases are laudable,

firms are more likely to reduce their use of hazardous chemicals or substitute less harmful ones if it is economically advantageous.)[4] It does not make sense that Congress did not intend to allow citizen suits for past violations involving actual contamination, *Gwaltney*, 484 U.S. 49, but did intend to allow citizen suits for past reporting violations.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should grant the Petition and reverse the decision below.

Respectfully submitted,

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[4] By stating that The Steel Company "is not an insignificant polluter," Resp. Br. at 4, Respondent also appears to suggest that The Steel Company is either operating without a permit or violating its permitted levels. Such is not the case. Respondent is indulging in the (perhaps common) misconception that because a company lists releases to the environment in its EPCRA reports, uncontrolled releases must be taking place, when in reality the company is responsibly managing its operations and waste materials. Even Respondent's members, who certainly drive cars, ride in buses, trains and airplanes, generate household waste, and generally avail themselves of the benefits of an industrial and consumer society, must admit that they are also "polluters."